No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

HARMEL OUELLETTE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to this Court's Rule 42, Mid-America Legal Foundation ("*Mid-America*") hereby moves the Court for leave to file the attached brief as *amicus curiae* in support of petitioner.

Mid-America has an interest in the disposition of this case, which is before this Court on a writ of certiorari to the United States Court of Appeals for the Second Circuit. Mid-America participated as *amicus* in several cases that bear on the issue now before the Court including *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), and *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom. Scott* v. *City of Hammond*, 105 S.Ct. 979 (1985).

Mid-America was organized in 1975 to support the public interest in preserving the economic and political freedoms of our democratic society. The Foundation takes special interest in questions of law of a national scope that originate in or have a direct effect on the mid-America region, namely: Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the decision below interprets

the "savings" clause of the Federal Water Pollution Control Act, Section 505(e), 33 U.S.C. § 1365(e), in a way which affects the interest of every state which shares a waterway with one or more states. By analogy, the implications of the decision extend beyond the question of interstate water pollution to include problems of air pollution and land use.

Mid-America respectfully submits that its brief, lodged herewith, presents at least one analysis of a significant question of federal law and related authority which is not adequately presented by the parties. It is the view of Mid-America that the Court of Appeals improperly construed the applicability of state common law remedies under the Federal Water Pollution Control Act in conflict with both the comprehensive federal statutory program for interstate water pollution control and with the decisions of this Court.

Mid-America has received the oral consent of petitioner, International Paper Company, and the written consent of respondent, State of Vermont. A copy of the written consent is being filed with the clerk. Consent was refused by counsel for respondents, Ouellette, *et al.*, necessitating this motion.

Mid-America respectfully urges this Court to grant this motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

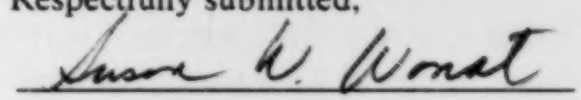

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TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		iv
INTEREST OF *AMICUS*		1
SUMMARY OF ARGUMENT		2
ARGUMENT		2
I.	The Court of Appeals Erred When it Construed the Federal Water Pollution Control Act to Allow State Common Law Nuisance Suits to be Brought in Any Court and Under the Law of Any State Where the Effect of a Discharge Occurs.	2
II.	Principles of Statutory Construction Require That Individual Provisions of a Comprehensive Statutory Scheme Should be Construed to Give Effect to the Legislative Purpose of the Entire Act.	5
CONCLUSION		8

TABLE OF AUTHORITIES

Cases

PAGE

City of Milwaukee v. *Illinois ("Milwaukee II")*, 451 U.S. 304 (1981) 6

Colautti v. *Franklin*, 439 U.S. 379 (1979) 7

Hinderlider v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1934) 6

Illinois v. *City of Milwaukee ("Milwaukee I")*, 406 U.S. 91 (1972) 6

Illinois v. *City of Milwaukee ("Milwaukee III")*, 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom. Scott* v. *City of Hammond*, 105 S.Ct. 979 (1985) 6

Mountain States Telephone & Telegraph Co. v. *Santa Ana*, 472 U.S. ____, 105 S.Ct. 2587 (1985) 7

Philbrook v. *Glodgett*, 421 U.S. 707 (1975) 5, 6

Sierra Club v. *Lynn*, 364 F.Supp. 834 (W.D. Tex 1973), *aff'd in part* and *rev'd in part on other grounds* at 502 F.2d 43 (1974) 3

Statutes

Federal Water Pollution Control Act of 1972:

Sections 101-518, 33 U.S.C. §§ 466-1378 2

Section 101(b), 33 U.S.C. § 1251(b) 3

Section 401(a)(1), 33 U.S.C. § 1341(a)(1) 4

Section 401(a)(2), 33 U.S.C. § 1341(a)(2) 3, 4

Section 402, 33 U.S.C. § 1342 3

Section 402(a)(3), 33 U.S.C. § 1342(a)(3) 4

Section 402(b)(3), 33 U.S.C. § 1342(b)(3) 3, 4

Section 402(b)(5), 33 U.S.C. § 1342(b)(5) 3, 4

Section 505(e), 33 U.S.C. § 1365(e) 2, 4

Section 510, 33 U.S.C. § 1370 3

Other

McCaffrey, Francis J., *Statutory Construction*, § 62 (1953) 8

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INTEREST OF *AMICUS*

The interest of Mid-America Legal Foundation as *amicus curiae* is set forth fully in the motion for leave to file which accompanies this brief.

SUMMARY OF ARGUMENT

In the Federal Water Pollution Control Act of 1972 ("*FWPCA*"), Sections 101-518, 33 U.S.C. §§ 466-1378 (1981), Congress created an integrated statutory scheme for water pollution abatement which accommodates state interests, but remains subject to federal supervision. The statute allocates substantial responsibility to the states for implementing specific programs, but it provides expressly for resolution of interstate water disputes through federally supervised procedures.

The "savings" clause of the FWPCA, Section 505(e), 33 U.S. § 1365(e), provides "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." The United States Court of Appeals for the Second Circuit erred when it construed this provision to allow property owners in Vermont to sue in Vermont courts and under the common law of that state an effluent producer located in New York. This construction undermines the legislative purpose of the FWPCA to ensure uniformity and finality in dealing with interstate water disputes by effectively subjecting dischargers to liability for state common law nuisance actions in any state which adjoins an interstate waterway. The decision of the Court of Appeals ignored well-established principles of statutory construction which require that a court interpret the individual provisions of a comprehensive statutory scheme to give effect to the legislative purpose of the entire act.

ARGUMENT

I. The Court of Appeals Erred When it Construed the Federal Water Pollution Control Act to Allow State Common Law Nuisance Suits to Be Brought in Any Court and Under the Law of Any State Where the Effect of a Discharge Occurs.

The United States Court of Appeals for the Second Circuit, adopting in most respects the opinion of the district court, held

that the FWPCA authorizes property owners in Vermont to sue, in Vermont courts and under the common law of the state, an effluent producer located in New York. Pet. Cert. App. at A-25, 602 F. Supp. at 274. This decision squarely conflicts with the legislative purpose and statutory scheme embodied in the FWPCA and with the decisions of this Court.

In the FWPCA, Congress created a federally supervised system of comprehensive plans for water pollution abatement through the integration of state and national standards. *See, e.g., Sierra Club* v. *Lynn,* 364 F. Supp. 834, 844 (W.D. Tex. 1973), *aff'd in part* and *rev'd in part on other grounds* at 502 F.2d 43 (1974). In furtherance of this scheme, Congress provided that states could adopt more stringent standards than the federally promulgated minimum requirements. If approved, however, the stricter state standards were incorporated as requirements of the federal permit. Section 510, 33 U.S.C. § 1370, Section 402, 33 U.S.C. § 1342.

Even while Congress expressly acknowledged its intent to "recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . . .", Section 101(b), 33 U.S.C. § 1251(b), it just as explicitly provided for resolution of interstate water pollution disputes through the federally supervised procedures set forth in the FWPCA. Section 401(a)(2), 33 U.S.C. § 1341(a)(2), Section 402(b)(3), (5), 33 U.S.C. § 1342(b)(3), (5). Thus, the FWPCA did not create two independent systems of water pollution control, but a single integrated scheme. This scheme accommodates state interests, but remains subject to federal supervision.

Anticipating that resolution of interstate disputes in the context of the FWPCA was a potential source of difficulty, Congress expressly tackled this concern by providing detailed procedures for resolving disputes concerning discharges that affect another state. Section 402(b)(3) of the FWPCA, 33

U.S.C. § 1342(b)(3), requires that any state "whose waters may be affected" by the issuance of a discharge permit shall receive notice of the permit application and an opportunity for public hearing before a permit is granted. Section 402(b)(5), 33 U.S.C. § 1342(b)(5), then allows the affected state to submit written objections, including their own more stringent standards, to the permitting state and the Administrator or USEPA or another federal agency. Section 401(a)(1), (2), 33 U.S.C. § 1341(a)(1),(2), Section 402(a)(3), § 1342(a)(3). These separate provisions, envisioning a comprehensive scheme of federal and state regulations, clearly were enacted to complement one another in providing an efficient and fair system for controlling pollution in our waterways.

The "savings" clause, Section 505(e), 33 U.S. §1365(e), which is the focal point of the issue before this Court, provides "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." The decision of the U.S. Court of Appeals for the Second Circuit frustrates the basic purpose of the FWPCA by construing this section in a way which undermines the other provisions of the statute that are designed to ensure uniformity and finality in dealing with interstate water disputes.

Choice of law considerations resulting from this construction would generate uncertainty about the discharge requirements that must be met to protect against state common law nuisance suits. This problem would be compounded where more than two states border a waterway. Under these circumstances, dischargers in one state may be subject to state common law nuisance suits in every jurisdiction which is affected by the discharge.

Clearly, the FWPCA establishes a comprehensive federal system for interstate water pollution control that is based on federal/state cooperation. There is no question that Congress intended that the states retain primary responsibility for the

control and elimination of water pollution within their boundaries. This responsibility is to be exercised, however, as a complement to the uniform federal system and not in derogation of it.

II. Principles of Statutory Construction Require that Individual Provisions of a Comprehensive Statutory Scheme Should be Construed to Give Effect to the Legislative Purpose of The Entire Act.

The courts below erred when they gave the broadest possible construction to the "savings" clause of the FWPCA at the expense of furthering the legislative goals of the entire act. In a case of statutory construction, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and its object and policy." *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975). The court's objective in a case such as this is "to ascertain the congressional intent and give effect to the legislative will." *Id.* at 707. The *Philbrook* case involved the interpretation of both a federal statute and a state regulation dealing with aid to Families with Dependent Children ("*AFDC*"). This Court construed the federal statutory provision to mean that the actual payment of, rather than mere eligibility for, unemployment compensation would be a disqualifying factor for AFDC benefits. The state regulation, which could have been applied to exclude unemployed fathers who are merely eligible for unemployment compensation, was held to impermissibly conflict with the federal provision. After studying the legislative history of the AFDC program of the Social Security Act, this Court concluded that an interpretation of either the federal statute or the state regulation which would exclude children of parents who were merely eligible for unemployment compensation would not serve the purposes of the program.

Furthermore, the *Philbrook* Court did not want an individual state to be able to change the definition of an "unemployed

father." "An important purpose of the 1968 amendments was to eliminate the variation in state definitions of unemployment . . . and Congress twice turned back attempts by the Senate to restore to States discretion in the coverage of the program." *Id.* at 719. To allow widely varying rulings among states on such an issue, the court reasoned, would be inconsistent with Congress' intent. *Id.* at 710 n.6. Thus, in the administration of a nationwide program such as AFDC, this Court already has reiterated the importance of harmony between state regulations and the objectives and policy of a federal program.

These are precisely the same factors which the Seventh Circuit found so critical in *Illinois* v. *City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom. Scott* v. *City of Hammond,* 105 S.Ct. 979 (1985) ("*Milwaukee III*"), but which the U.S. Court of Appeals for the Second Circuit, in the instant case, all but ignored. The *Milwaukee III* decision, which involved issues similar to those now before the Court, held that the "savings" clause of the FWPCA should be construed to preserve only state common law nuisance actions in a state where the discharge occurs. Citing *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), ("*Milwaukee I*"), *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981), ("*Milwaukee II*"), and *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), the Seventh Circuit noted that "the claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing users." 731 F.2d at 410-11.

Within this context the *Milwaukee III* court found it "implausible that Congress meant to confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statute or common law of State II." 731 F.2d at 414. Such a construction would undermine the "uniformity and state cooperation envisioned by the Act." *Id.*

Furthermore, it is an elementary canon of construction that a statute "should be interpreted so as not to render one part inoperative." *Mountain States Telephone and Telegraph Co.* v. *Santa Ana,* 427 U.S. ____, 105 S.Ct. 2587 (1985); *Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979). The *Mountain States* case involved the validity of a 1928 purchase of an easement by the telephone company from the Indians of Santa Ana, New Mexico. The company contended that the purchase of this easement was valid under § 17 of the Pueblo Lands Act of 1924 because it was "first approved by the Secretary of the Interior." The Pueblo Indians, however, argued that the easement was never valid because § 17 only authorizes such transfers "and as may hereafter be provided by Congress" and that Congress never passed such legislation.

Although conceding that both of these constructions found "some support in the language of § 17", this Court ruled that the telephone company's interpretation of § 17 better harmonized "with the structure of the entire Act and with its contemporary legal context." *Id.* at 2596. In so ruling, this Court was mindful not only of this particular conveyance, but of numerous others in the years following the enactment of the Pueblo Lands Act of 1924. *Id.* at 2597. In sum then, this Court was striving for a common sense interpretation which would clear up any ambiguities in the law and provide a clear and uniform guideline for future courts.

Likewise, in the instant case, this Court should reconcile the different parts of the FWPCA to give them a meaning in harmony with each other. If the opinion below is allowed to stand, it will render meaningless those parts of the statute envisioning a comprehensive and uniform scheme for pollution control of interstate waterways.

In his treatise on statutory construction, Francis J. McCaffrey notes that "in all cases, provisos, exceptions and savings clauses should be read according to the apparent intent of the Legislature (with respect to purpose of statute)." Francis

J. McCaffrey, *Statutory Construction* § 62 (1953). In fact, McCaffrey suggests that a "general savings act will not be held to apply where it is evident that the effect of its application would be to defeat the manifest purpose of the Legislature in the statute as a whole." *Id.* at § 62.

Clearly, the courts below were in error when, ignoring settled principles of statutory construction, they construed the "savings" clause in a way which frustrates the purpose of the FWPCA.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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